

Protest of) Date: December 22, 1988
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E-Z COPY, INC.)
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Solicitation Nos. 489990-88-A-0582;)
-0583; -0585; and -0586) P.S. Protest No. 88-61

DECISION

E-Z Copy, Inc., of California has filed a timely protest against several of the terms of Solicitation Nos. 489990-88-A-0582; -0583; -0585; and -0586, issued September 19, 1988, by the Procurement and Materiel Management Service Office, Dallas, TX, for coin-operated photocopier services at various post offices in Oklahoma and Texas.

The formally advertised solicitations, sent to seven prospective offerors, were set out in the standard form for coin-operated copiers, PS Form 7481. The terms of the solicitations were identical, except for the list of post offices where the copiers were to be located and the estimated monthly average of copies per copier at the various offices. Each contract had a three-year term and contained a standard termination clause allowing either party to terminate all or any part of the contract, without liability, upon sixty days' written notice. The solicitations designated Service Plan 3, in which the Postal Service supplies power and space for the copiers, loads the copiers with paper, clears jams, and collects and accounts for coins, remitting the contractor's commission to the contractor within thirty days of receipt of the invoice. The contractor provides everything else, including training postal employees to perform the tasks outlined in the plan.^{1/}

Each solicitation also contained a standard Repairs or Replacement clause requiring the contractor to replace or repair, at the option of the Postal Service, any post office property damaged by the contractor. It places responsibility on the contractor for loss of or damage to the copiers not caused by the negligence of the Postal Service. The clause requires the contractor to repair or replace copiers which "work poorly." A copier is deemed to be working poorly if it is available for use less than 95% of the time the lobby is open for business, or between the hours of 7:00 a.m. and 6:00 p.m., whichever is less. The clause also contained times for response to service calls. For example, in communities of 100,000 or more people, the contractor must respond within four hours to any call made between 7:00 a.m. and 2:00 p.m. on any Postal Service

^{1/}This service plan is one of three standard plans listed in the solicitations. Under Plan 1, the Postal Service provides only power and space. The contractor supplies everything else and must pay the Postal Service its commission within thirty days of each collection period. Plan 2 is identical to Plan 3, except the Postal Service does not collect the coins.

business day, and must respond to calls received after 2:00 p.m. by 11:00 on the following business day.

The standard specifications for these solicitations included several requirements. The console model copiers, which could be new or reconditioned, had to have an on/off switch, a start/stop switch, an internal copy counter, a curved or flat platen, a paper-size indicator, a warning signal for jams and other malfunctions, a coin-changing device, and a ready and not-ready signal. In addition, the copiers had to be sheet or roll fed and copy all types of material in accordance with industry standards. Also standard was the requirement that the contractor assume the responsibility for protecting the coins and supplies from theft and vandalism. The only non-standard specification was that the copiers use the plain paper process, which requires dry toner. In a previous version of the standard specification, solicitations using PS Form 7481 provided the opportunity for offerors to propose the use of either plain paper (dry toner), or treated paper (liquid toner).

Each solicitation provided for offers to be evaluated on the basis of the monthly estimated average of copies per copier. The averages varied with each solicitation. For example, Solicitation No. 489990-88-A-0582 was based on a monthly average of 450 copies per copier for each location, whereas solicitation No. 489990-88-A-0583 was based on 1000 copies per copier. The Postal Service made no guarantee that the figures represented actual copy volume. A standard clause required the contractor to pay the Postal Service a monthly commission. Offerors could quote different percentage rates for different ranges of volume levels as follows:

Number of copies	USPS commission
_____ to _____	_____ %
_____ to _____	_____ %
_____ to _____	_____ %
_____ to _____	_____ %

An addition to the clause, not in the standard provision, prohibited any commission percentage from exceeding 100%.

While the protest was pending, E-Z Copy sent a letter to the contracting officer requesting that the bid opening be suspended. The contracting officer declined to take this step and held bid opening as scheduled. On October 11, two bids were received for Solicitation No. 489990-88-A-0586, one for Solicitation No. 489990-88-A-0583, and none for the other two solicitations.

E-Z Copy protested several of the solicitation terms. First, it alleges that several terms "have the effect of seriously eroding the competitive ability of many small businesses/contractors..." and provide no real benefit to the Postal Service. These terms included: the designation of Service Plan 3; the sixty-day termination clause; the requirement that the contractor assume responsibility for protecting the coins and supplies from theft; the requirement for a coin changer; and the requirement for dry toner. It further alleges that the evaluation criteria are ambiguous, vague, and invite unbalanced bidding, because it is not clear whether the limitation of the commission level to less than 100% applies to the entire offer, or to each volume range. It asserts that this precludes the offeror from performing at a loss, which it claims is a bidder's

right.^{1/} It opposes the use of the average monthly usage figures as not representing a reasonably accurate expectation of the needs of the Postal Service, and, therefore, also causing unbalanced bidding.^{1/} Finally, E-Z Copy alleges ambiguity in the repair and replacement standard, claiming that it does not set forth a time frame to which the 95% criterion applies (i.e. to the life of the contract, or to each specific day of operation). Without explaining its reasoning, it asserts that "the Postal Service should utilize a stated response time for repairs/replacement rather than the ambiguous utilization of a percentage figure."

The contracting officer's statement explains that Service Plan 3 is preferable because the Postal Service collects and accounts for the coins, giving it more control over the accounting of the funds. She claims that dry toner is the most widely used in the industry, produces a clearer copy, and is preferred by customers. She asserts that the Postal Service does not solicit for copiers using the treated paper/wet toner method, as it is no longer "state-of-the-art." The contracting officer also states that the Postal Service, although placing responsibility on the contractor for theft or vandalism, endeavors to provide as much security as possible. In situations where copiers are not installed in a secure place, such as lobbies that are open 24 hours a day, the coin boxes are removed and placed in a safe each day at close of business. She further relates that the change-making device requirement is for the convenience of the customers. The contracting officer fails to see how the termination clause could have an anticompetitive effect on small business, as the Postal Service was neither awarding a sixty-day contract, nor asking for a sixty-day commitment.

Further, the contracting officer maintains that the commission percentage limitation is not ambiguous, because the solicitations allow the offeror to vary the commission rate for different levels of usage, but do not allow any percentage rate to exceed 100%. She points out that the Postal Service has dealt with this issue previously in VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988, aff'd on reconsideration, March 31, 1988. She asserts that "a reasonably accurate expectation of the Postal Service's requirements" of the monthly average usage figures is not required, and that the various figures in each of the solicitations represents the Postal Service's best estimate of each copier's monthly usage. Finally, the contracting officer denies that the standard "Repairs and Replacement" section is either vague or ambiguous.

Pitney Bowes, Inc., as an interested party, submitted comments on this protest. It concurs with the contracting officer's statement, saying there is a rational basis for each of the contested requirements, the solicitation is not vague, and does not lead to unbalanced bidding.

^{2/}E-Z Copy cites two previous decisions of this office in support of this contention, Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984 and Leewen Mechanical Corp., P.S. Protest No. 83-70, January 19, 1984.

^{3/}E-Z Copy specifically complains about the figure of 600 copies per month used in Solicitation No. 48990-88-A-0585. Different figures were used in each of the other solicitations. It is not clear whether E-Z Copy objects to this particular figure, or to all the figures.

The Postal Contracting Manual (PCM) states, at PCM 1-1101(a), that:

...specifications or purchase descriptions shall state only the actual minimum needs of the Postal Service and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers.

E-Z Copy complains that certain requirements of the solicitations do not serve the best interests of the Postal service. We have often held that "the drafting of specifications is primarily a function of the Postal Service's technically qualified experts and this office will not substitute its judgment on a technical matter in the absence of clear and convincing evidence of an error." Crown Industries, Inc., P.S. Protest No. 85-40, August 12, 1985; Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975. E-Z Copy's disagreement with certain terms do not amount to proof that these terms are not in the Postal Service's best interest, and we have not been presented with any evidence which otherwise establishes that these requirements are in error.

E-Z Copy also alleges that these requirements unduly restrict competition.^{4/} The standard by which we review such allegations are as follows:

...it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Portion-Pac Chemical Corp., Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43. If a specification is reasonable, it is not unduly restrictive simply because a particular bidder is unable to meet it. Portion-Pac Chemical Corp., *supra*; see also Bowne Time Sharing, Inc., Comp. Gen. Dec. B-190038, May 9, 1978, 78-1 CPD & 347, CompuServe, Comp. Gen., Dec. B-188990, September 9, 1977, 77-2 CPD & 182.

Most of the terms and clauses at issue are prescribed by the standard Postal Service solicitations for coin-operated copiers. The contracting officer has adequately explained the rationale behind all of the contested terms, both standard and non-standard. The fact that few offers were actually received is not dispositive evidence that the solicitation terms are restrictive. Solicitation No. 489990-88-A-0582 was based on a monthly average of 450 copies per copier, to be placed in 18 locations. Solicitation No. 489990-88-A-0585 was based on a monthly average of 600 copies per copier, to be placed in 51 locations. Solicitation No. 489990-88-A-0583 was based on a monthly average of 1000 copies per copier, for 42 locations. Finally, Solicitation No. 489990-

^{4/}To the extent that E-Z Copy's allegations of the anticompetitive effect of certain solicitation terms lie in the area of antitrust law, these claims are outside the scope of our bid protest jurisdiction. Denis Copy Company, P.S. Protest No. 88-43, August 5, 1988; Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985; Western Publishing Company, Inc., P.S. Protest No. 84-3, April 10, 1984.

88-A-0586 was based on a monthly average of 900 copies per copier, for 35 locations. The solicitations that received no offers were the ones which would produce the least amount of business. The protester has submitted insufficient evidence to show that these specifications are clearly unreasonable. Therefore, there is no basis for overturning the Postal Service's requirements for copiers of the types specified.

E-Z Copy alleges that the "Repair and Replacement" clause is ambiguous, arguing that the clause does not specify a time frame during which the performance standard applies, suggesting that a stated response time would be less ambiguous. First, a stated response time is already included in the clause; it has no bearing on the performance standard. In addition, the clause is one that has been used successfully in numerous prior solicitations without precipitating complaints of ambiguity. We will not disturb the decision of the contracting officer to include this provision and to hold the bid opening as scheduled.

E-Z Copy complains that the solicitation terms concerning the commission percentage limitation and the Postal Service's average monthly copy estimates are vague, ambiguous and will lead to unbalanced bidding. The protester has filed earlier protests on similar issues in the recent past. See E-Z Copy, Inc., P.S. Protest No. 88-38, July 29, 1988; E-Z Copy, Inc., P.S. Protest No. 88-28, July 29, 1988. Absent new evidence or arguments, we may deal with these issues summarily. Cf. Sea-Land Services, Inc., United States Lines, Inc., P.S. Protest No. 80-79, April 9, 1981, aff'd on reconsideration, June 16, 1981. Contrary to E-Z Copy's contention, limiting the percentage rate of commissions tends to discourage unbalanced bidding. There is no substance to E-Z Copy's allegations that the solicitations invite unbalanced bidding. VNP Vending Corporation, supra; see also, E-Z Copy, Inc., P.S. Protest No. 88-28, supra; Howell Construction, Inc., Comp. Gen. Dec. B-225766, April 30, 1987, 87-1 CPD & 455. Finally, we disagree that the provision is ambiguous; it clearly precludes any individual volume range commission from exceeding 100%; it thus also precludes total offers at a rate or rates which exceed 100%.

Lastly, E-Z Copy objects that these limiting factors deny it the "right" to perform the contract at a loss. The cases cited by E-Z Copy, Leewen Mechanical Corp., supra; Lightron of Cornwall, Inc., supra, do not stand for the proposition that the Postal Service must fashion its solicitations so as to allow a bidder the opportunity so to bid, but merely state that a bid may not be rejected solely because it is at a price which is below the actual cost of contract performance.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 3/4/93]